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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RAY McCURRY and JOHN WALL,
Plaintiffs in Error.

—vs.—

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

MILLER, O'CONNOR & MILLER,
Attorneys for Plaintiffs in Error.

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BRIEF OF PLAINTIFFS IN ERROR

The plaintiffs in error were indicted by the Grand Jury on three counts, which indictment is set forth in Transcript at pages 1, 2, 3, 4 and 5 and to which they entered pleas of Not Guilty.

On the 17th day of January, 1921, the cause came on regularly for trial and the plaintiffs in error were by the jury found guilty on counts two and three and not guilty as to count one. The plaintiffs in error, being present in Court, judgment was entered as follows: "It is therefore CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said Ray McCurry and John Wall, each be confined

and imprisoned in the county jail at Helena, Montana, for the term of Nine Months, and you, the said Ray McCurry, pay (10) a fine of Five Hundred Dollars, and costs taxed at $170.90, and you, the said John Wall, pay a fine of Two Hundred Dollars, and costs taxed at $170.90, and that you be confined in said county jail until said fines are paid or you are otherwise discharged according to law. Thereupon, on motion of defendants, and for good cause, commitment ordered stayed for twenty days.

Thereafter, on February 17, 1921, Notice of Motion and Motion for New Trial was duly filed, which said Motion was, on July 2, 1921, denied.

On July 2, 1921, the Bill of Exceptions was duly settled and allowed and filed as set forth in Transcript at page 14.

On July 8, 1921, the plaintiffs in error petitioned for Writ of Error and for Supersedas and Bail, Transcript page 29.

ASSIGNMENT OF ERRORS.

In said petition for Writ of Error, the following assignment of error was made:

First. The District Court of the United States for the District of Montana erred in instructing the jury in the trial of said cause that evidence tending to show the probability of guilt of the defendants was sufficient to warrant a conviction, to the giving of which instruction the defendants excepted before going out of the jury.

Second. The District Court of the United States for the

District of Montana erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond, to the giving of which instruction the defendants excepted before the going out of the jury.

Third. The said Court erred in refusing to give an instruction asked by the defendants reading as follows:

"You are instructed that mere suspicions or probabilities, however strong, are not sufficient to warrant a conviction."

Fourth. The said Court erred in rendering and entering judgment against the defendants.

On July 8, 1921, order allowing the Writ of Error and admitting the defendants to bail was made.

ARGUMENT.

Taking up the assignment of errors in the order stated it is first claimed that the court erred in instructing the jury in the trial of said cause that evidence tending to show the probabilities of guilt of the defendants was sufficient to warrant a conviction. It is considered that prejudicial error was committed in that the jury could have received the wrong impression from the remarks of the court, Transcript page 26, wherein he stated: "That is not the law because after all, all cases are determined upon probabilities." Counsel contends that he did correctly state the law and in support thereof cites the case of State vs. Riggs, 56 Montana, 399, wherein the court said: "Defendant may not be convicted on conjectures however *shrewd*, on suspicions however justified, on probabilities however strong, but only upon evidence which establishes guilt

beyond a reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true." Counsel insists that he did not mis-state the law when he remarked that the jury could not convict on probabilities and that there was error committed by the court when it interrupted him and stated that that was not the law. It would seem that the court did no go so far in his statement of the law as did the Supreme Court in Dunbar's case, 156 U. S. 199, wherein the following rule was laid down: "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," it gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities," yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. Hopt v. Utah, 120 U. S. 430, 439 (30; 708, 711); Com. v. Costley, 118 Mass. 1, 23.

In the next instance, it is urged that the District Court erred in instructing the jury that the burden was upon the de-

fendants to show the registration of the still and the filing of the bond. To this charge, the plaintiffs in error object for the reason that it is the law that in criminal cases the burden of proof never shifts. It seems that the case of Davis vs. U. S. 160 U. S. 469, should be conclusive upon this point. The Supreme Court of the United States speaking through Justice Harlan, says: 'strictly speaking, the burden of proof as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the guilt for which he is indicted; it is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime." As applied to this case, the above rule would demand that the prosecution prove the registration or lack of registration of the still and the filing or lack or filing of the bond. This proof could have been readily produced from the records of the Internal Revenue Department and it is the contention here that it was not encumbent upon the plaintiffs in error to testify in this regard and that no presumption could be taken against them for failure to testify. There is no better settled rule of law than that the defendant is clothed with a presumption of innocence from the beginning until such time that he is deemed guilty beyond a reasonable doubt and that his failure to testify in his own behalf does not raise a presumption or inference against him. It has many times been held a prejudicial error where the prosecuting attorney has been allowed to comment upon the failure of the defendant to testify and the courts have been very emphatic in stating that no presumption could be

raised against the defendant therefore. State vs. Cameron, 40 Vermont, 555; Commonwealth vs. Maloney 113, Mass. 211.

For the reasons above stated, the plaintiffs in error respectfully urge that the order denying their Motion for a New Trial should be reversed and that the judgment herein in favor of the defendant in error should be reversed.

MILLER, O'CONNOR & MILLER,
Attorneys for Plaintiffs in Error.